

DISTRICT OF COLUMBIA
BOARD OF ZONING ADJUSTMENT

Prehearing Statement of 3801 MACOMB STREET LLC
3801 Macomb Street, NW (Square 1817, Lot 822).

I. INTRODUCTION.

This Statement is submitted on behalf of 3801 Macomb Street, LLC (the “**Applicant**”), owner of the property located at 3801 Macomb Street LLC (Square 1817, Lot 822) (the “**Property**”). The Property is currently improved with a three-story, nine-unit apartment building¹ (the “**Building**”). As discussed more fully below, the Applicant is proposing to do an addition (the “**Addition**”) to the existing Building in order to renovate the building, eliminate the 9th unit not included in the C of O, and increase the available living space for the remaining eight of the units. The existing Building is considered a non-conforming use as it is in the R-1-B Zone. Accordingly, the Applicant is requesting a use variance from the prohibition against extending a nonconforming use in land area (C-201.1).

II. JURISDICTION OF THE BOARD.

The Board has jurisdiction to grant the use variance relief requested pursuant to Subtitle X § 1002.1(b) from the use requirements of Subtitle C § 201.1).

III. BACKGROUND.

A. Description of Property and Surrounding Area

The Property is located in the R-1-B Zone. It is a relatively large corner lot, with a land area of 16,569 square feet. Abutting the Property to the north is a large condo building approved as part of the Cathedral Commons Partners, LLC PUD. Abutting the Property to the south is

¹ The Certificate of Occupancy only permits eight units legally; however, the building was configured with a 9th unit at the time the Applicant purchased the Property.

Macomb Street, NW. Abutting the Property to the west is a public alley and the rear of 3321 Idaho Avenue, NW. Abutting the Property to the east is 38th Street, NW. The area is made up of a mix of large apartment buildings, smaller apartment buildings, flats, and single-family dwellings. The Property is also located about a block and a half from the National Cathedral.

B. Proposed Project

The Applicant is proposing to demolish portions of the existing building and construct an addition to the Building. As part of the Project, the Applicant is creating a large courtyard so that all units can have private space and ample light and air. The units will be large units with ample rooms to create offices for adults working from home, playrooms for children, or housing for students.

IV. USE VARIANCE.

The Applicant is requesting use variance relief from the Use Permissions of U-201 in order to increase the living space in each of the existing units. The Board is authorized to grant use variance relief where it finds that three conditions exist:

- (1) The property is affected by exceptional size, shape or topography or other extraordinary or exceptional situation or conditions;
- (2) The owner would encounter an undue hardship if the zoning regulations were strictly applied; and
- (3) The variance would not cause substantial detriment to the public good and would not substantially impair the intent, purpose and integrity of the zone plan as embodied in the Zoning Regulations and Map.

See French v. District of Columbia Board of Zoning Adjustment, 628 A.2d 1023, 1035 (D.C. 1995); *see also, Capitol Hill Restoration Society, Inc. v. District of Columbia Board of Zoning Adjustment*, 534 A.2d 939 (D.C. 1987).

The variance procedure has many purposes. It is designed to provide relief from the strict letter of the regulations, protect zoning legislation from constitutional attack, alleviate an otherwise unjust invasion of property rights and prevent usable land from remaining idle. These purposes infuse meaning into the phrase “exceptional and undue hardship.” *Palmer v. D.C. Bd. of Zoning Adjustment*, 287 A.2d 535, 541-42 (1972).

For the Board to grant use variance relief, “it must be shown that the regulations ‘preclude the use of the property in question for any purpose for which it is reasonably adapted, *i.e.*, can the premises be put to any conforming use with a fair and reasonable return arising out of the ownership thereof?’” *Palmer v. BZA*, at 542, citing 2 A. Rathkopf, *The Law of Zoning and Planning*, Note 21, at 45-5 (3d ed. 1962).

A. Unique Physical Aspect or Other Exceptional Situation/Condition.

In order to prove an extraordinary or exceptional condition, or uniqueness, the Applicant must show that the property has a peculiar physical aspect or other extraordinary situation or condition. *Monaco v. D.C. Board of Zoning Adjustment*, 407 A.2d 1091, 1096 (D.C. 1979). The Court of Appeals held in *Clerics of St. Viator v. D.C. Bd. of Zoning Adjustment*, 320 A.2d 291 (D.C. 1974) that the exceptional situation or condition standard goes to the property, not just the land; and that “...property generally includes the permanent structures existing on the land.” *Id.* at 293-94. The Court held that the exceptional situation standard of the variance test may be met where the required hardship is inherent in the improvements on the land (*i.e.*, the building or structure) and not just the land itself.

In *Monaco v. D.C. Board of Zoning Adjustment*, the Court of Appeals held that the history of a property could be considered in making the determination of uniqueness. In that case, the Court affirmed the BZA's broad interpretation of the uniqueness test and the Board's ability to consider the history of the Applicant, its traditions, as well as the existing structure on the property.

The Property is unique because of the existing improvements on the Property. The Building was constructed prior to the adoption of the 1958 Zoning Regulations and has been used continuously as an apartment building since its construction. The Building was constructed in 1909 and was at some point converted to eight residential units. The oldest C of O on record dates back to 1973. Accordingly, the Building has been configured as an apartment building for at least 48 years. As demonstrated by the "as-built" plans included as an exhibit to this statement, the existing unit layouts are odd and inconsistent. For example, there are four, 1-BR units in the cellar level, one, 4-BR unit on the first floor, three units on the second floor (a studio, 1-BR, and 2-BR), and one unit on the third floor. The first-floor unit has four bedrooms while one of the second-floor units does not even have a kitchen.

At some point, prior to the Applicant's purchase of the Property, a 9th unit was created. Accordingly, the Applicant must eliminate a unit to bring the building into compliance. This is one of the many motivators for renovating and expanding the Building as the interior layouts must be reconfigured, even if the other unit layouts made sense. Moreover, the building has no amenities, and the units are old and in desperate need of renovation and modernization. For these reasons, the Building requires a complete interior demolition and renovation.

The Property is also relatively large, at 16,569 square feet. The only other similarly sized lots are occupied by apartment complexes or detached single-family dwellings. The existing

building only occupies 11% of the lot which is a much smaller footprint than what is permitted in the R-1-B Zone.² The Applicant is not proposing to add additional residential units; only to bring the building into compliance with its existing C of O for 8 units, through modernizing the Building and providing additional living space for each legal unit.

B. Strict Application of the Zoning Regulations Would Result in an Undue Hardship.

An owner is presented with an undue hardship when their “property cannot be put to any zoning-compliant use for which it can be reasonably adapted, i.e., can the premises be put to any conforming use with a fair and reasonable return arising out of the ownership thereof.” *Palmer v. District of Columbia Bd. of Zoning Adjustment*, 287 A.2d 535, 542 (D.C. 1972). The Applicant asserts that it clearly meets this standard as articulated by the Court in *Palmer*, as using the subject property for any conforming use would not result in a fair and reasonable return.

In *Gilmartin v. District of Columbia Bd. of Zoning Adjustment*, 579 A.2d 1164, 1171 (D.C.1990), the Court of Appeals held that “at some point economic harm becomes sufficient, at least when coupled with a significant limitation on the utility of the structure.” The Applicant asserts that this ruling comports neatly with the situation in this case, where there is a significant limitation on the utility of the Building with old, oddly-configured units, and where any zoning-compliant use would not be economically feasible.

In a more recent case, the Court of Appeals upheld this Board’s approval of a use variance and noted that economic harm to an owner in converting a portion of their property into a zoning-compliant use, coupled with significant limitations on the utility of a building, constituted undue hardship necessary to satisfy the second prong of the use variance test. *The*

² Buildings in the R-1-B Zone are permitted to have a lot occupancy of up to 40%.

Oakland Condo v. District of Columbia Bd. of Zoning Adjustment, 22 A.3d 748 (D.C. 2011).

Another important aspect of the Oakland Condo case is that the Court recognized as a factor that the relief requested was minor. The relief requested here is also quite minor in nature, as granting relief merely grants the Applicant the right to expand the building to 40% lot occupancy, the same amount permitted for one-family detached dwellings in this zone district.

The Applicant will therefore face an undue hardship without the relief because the matter-of-right options available will either result in too-small units, overpriced units which will be hard to sell in this area, or a severe economic loss.

Proposed Option- Use Variance Required

The Applicant is not proposing to add additional residential units, only to modernize the Building, offer competitive amenities, and provide additional living space to create more marketable units. The proposed units are set up as multi-storied homes as opposed to apartments. The proposal also includes a new study room, fitness center, and courtyard feature.

Matter-of-Right Option 1: No Addition

The first alternative matter-of-right option is to not do any addition and instead renovate the interior and maintain the existing Building footprint. As noted above, the Applicant must reconfigure the existing space due to the existence of a 9th unit not permitted via the C of O, simply to bring the building into compliance. In addition, the existing unit layouts are inefficient and inconsistent. The floor spaces are also uneven, with the third story being significantly smaller than the other floors. Accordingly, an interior demolition and renovation will cost a significant amount but not result in any additional space to rework the current inefficient building footprint without losing units. In this case, because of the cost of renovating the interior, the Applicant would have to propose much higher rents than in the surrounding area to recoup

any investment. Again, the Applicant would not be able to rent the units for the amount it would cost to recoup the investment in the renovation. Therefore, without the addition, a renovation not economically feasible. This option would also preclude the Applicant from adding crucial amenities such as a fitness room and study area—features needed to remain competitive in the area. While the proposed use variance contemplates the removal of a 9th unit as well, it makes up for the loss of the 9th unit by permitting an expansion and better footprint/layout of the legally existing 8 units. The matter-of-right option would eliminate a unit; however, it would not allow for an increase in space.

The property across 38th Street is located in the RA-2 zone and is a large apartment building. The property directly behind the Subject Property is also a large condo building (3336 Wisconsin Avenue, NW). In fact, a significant number of properties to the north and east are large apartment buildings as the Subject Property is located directly adjacent to apartment zones. This creates an issue where the Applicant must compete with other apartment and condo buildings that are not limited in terms of use by their respective zones, unlike the subject Property. The RA-2 zone may obtain a lot occupancy of up to 70% via special exception, whereas the Property must ask for relief to increase even up to a matter-of-right lot occupancy of 40%, unless of course the entire building was converted to a single-family dwelling.

Matter-of-Right Option 2: Convert to 1, One-Family Dwelling Unit

The second alternative matter-of-right option is to convert the purpose-built existing eight-unit building to a one-family dwelling. The most obvious impact of this proposal is that it would result in a loss of residential units in the District—units which have existed for about 50 years.

Matter-of-Right Option 3 - Subdivide the Lot and Create 3 Single-Family Dwellings

The Applicant could subdivide into three new lots as a matter-of-right (requires 50 ft. of lot width and 5,000 sq. ft. of land area per lot.) For similar reasons as described above, the most obvious impact of this proposal would be the loss of five residential units which have existed for about 50 years.

In summary, to be competitive with nearby apartment buildings – which can seek relief to expand to 70% lot occupancy to create new, modern units—the Applicant is seeking relief to construct an addition to the existing building. Unlike nearby apartment buildings, it is not possible to do this without a use variance (vs. MOR or special exception). The single-family options prove to be unrealistic as they would result in a loss of between 5-7 units. Without the relief, the only options are to keep the building as-is or to undergo an expensive renovation and rent overpriced units. Those options create an undue hardship as they effectively prohibit any improvements from being made to the building, resulting in economic harm.

C. Relief Can be Granted without Substantial Detriment to the Public Good and without Impairing the Intent, Purpose, and Integrity of the Zone Plan.

Relief can be granted without substantial detriment to the public good and can be granted without impairing the intent, purpose, and integrity of the Zone Plan. The Building is already configured for use as a multi-family residential building. The Applicant is simply proposing to update the building through an addition which conforms to all development standards of the R-1-B Zone. The Applicant could build a single-family home in this exact configuration.

V. CONCLUSION.

For the reasons outlined in this Applicant’s Statement, the Applicant respectfully requests the variance relief as detailed above.

Respectfully Submitted,

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